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In the Supreme Court of the United States

T. FRANK DOLAN, JR., LAURENCE SOVIK and MERCHANDISE BROKERAGE CORPORATION,

Petitioners,

vs.

ROBERT R. MEYER and MOKAVA CORPORATION,

Respondents.

In Proceedings for the Reorganization of The Onondaga Hotel Corporation, No. 27,263.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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To avoid repetition, three petitioners are joined. Petitioners Dolan and Sovik will be called "Dolan." Respondents will be called "Meyer." The issues as to these parties are the same. The issues as to Petitioner, Merchandise Brokerage Corp., while different, arises out of the same proceedings and repetition will be avoided by including it in this petition.

SUMMARY STATEMENT OF MATTER INVOLVED

On Jan. 16, 1939, Debtor filed its petition for reorganization under Chapter X of the Bankruptcy Act (F. 52). The liabilities of Debtor were as follows:

A. First mortgage of $364,000 with unpaid interest from April 10, 1937 (acquired by Dolan in July, 1943) on the "Main Hotel Building" (F. 259).

B. First mortgage of $190,000 with unpaid interest from May 1, 1937, on the "Annex" adjoining the main building, the two forming one structural hotel building. This mortgage was originally given to the First Trust & Deposit Co. (hereinafter called "First Trust"), in 1928, the mortgage being the usual New York State short form, containing no trust provisions or mention of participation certificates (F. 89-103). The First Trust sold undivided shares in this mortgage to various persons in various amounts (F. 644-8), issuing as evidence thereof so-called participation certificates (hereinafter called "Participations") (F. 120). On the commencement of these proceedings the owners of these "Participations" filed the usual proof of claim in bankruptcy (F. 656-60) and at all times have been parties to these proceedings.

C. A second mortgage of $233,000 with unpaid interest from Oct. 1, 1936, on the "Main Hotel Building," to secure Second Mortgage Bonds (hereinafter called "Bonds") in that amount now outstanding.

D. Merchandise Brokerage Corporation, the only unsecured creditor remaining unpaid, $4,603.00 (F. 220, 569).

(The capital stock was eliminated through an insolvency trial.)

Through options acquired on stock in 1938, Meyer caused the reorganization petition to be filed (F. 533). He also purchased Bonds from time to time, so that on Feb. 14, 1944, he owned about $53,000 of Bonds (F. 534). (Feb. 14, 1944, was the day of the first hearing on the plan in question.)

In addition to said first mortgage of $364,000 on the "Main Hotel Building" acquired by Dolan in July, 1943, he also purchased, prior to Feb. 14, 1944, $45,000 of Bonds and $30,252 of "Participations" in said first mortgage on the "Annex" (F. 527).

On April 20, 1942, upon notice to Meyer and all other interested parties, the Court fixed the time and place for a hearing "on the matter of classification of creditors and stockholders and the priority of mortgage liens" (F. 554). No order was made fixing such classification and priority until nearly a year later (April 12, 1943) because of a dispute between Bondholders and "Participation" holders as to which mortgage was a first lien on the "Annex." This controversy was determined in favor of "Participation" holders by the District Court on Jan. 15, 1943.

The Trustee filed his plan on April 7, 1943. Meyer, controlling about two-thirds of the stock, was a proponent of this plan (Appendix, p. ~~39).~~ 51, infra)

On April 12, 1943, the District Court made its order, classifying these two first mortgages in the same class. Meyer was not only a party in that proceedings, but was also a proponent.

On April 26, 1943, a motion was made on notice to all interested parties, including Meyer, to amend that order and place the "Participation" holders in a separate class and remove any doubt as to their right to vote. The District Court denied the motion that they should be in a separate class, but held that they—not the First Trust—had the right to vote on any plan (F. 566). An order was accordingly made on April 30, 1943, and due notice thereof given to all interested parties, including Meyer. Meyer,

being a proponent of this holding, naturally was satisfied. No appeal was taken from this order and it became the law of the case.

Dolan bought the first mortgage on the "Main Hotel Building" with full knowledge of that classification order. That mortgage represented 65.7% of that class. To control that class it was necessary for Dolan to acquire some "Participations." Dolan therefore purchased "Participations" amounting to $30,252 (F. 527) to be in a position to vote in excess of 66⅔% of that class.

Dolan then filed amendments to the Trustee's plan. Meyer also filed amendments at the same time (F. 239). The plan and these amendments came on for hearing on Feb. 14, 1944.

After the hearing and before the matter was determined by the Court, Dolan made further amendments to satisfy the First Trust, the owner in a fiduciary capacity as trustee, guardian, etc., of practically all of the "Participations" except those held by him. (F. 271, 360)

The Bondholders were entirely satisfied with the provisions made for them (F. 272). Thus everyone was satisfied with the plan, except Meyer, and Meyer merely filed a general objection that the plan "failed to comply with the provisions of Sec. 216 of the Bankruptcy Act (and was not) fair, feasible or equitable" (F. 229).

On March 18, 1944, the Trustee's plan, as amended by Dolan's proposals, was approved (F. 238). Notice of a hearing to be held April 10, 1944, to consider the confirmation of the plan was mailed March 25, 1944 (F. 273).

(The issuer of these "participations")

5

Meyer, in order to block the confirmation of Dolan's plan, had to find some way to vote all the "Participations" because Dolan owned $30,252 of them, which, together with the first mortgage on the Main Building, exceeded 66⅔% of that class, so six days later, on April 1, 1944, Meyer served an instrument on the First Trust under Sec. 275 of the New York Real Property Law, demanding an assignment of the whole mortgage and tendering the balance due thereon (F. 83, 128). (He had failed in previous attempts to buy the mortgage even on offer of the full amount due (F. 398)). For whatever it was worth, the First Trust accepted the tender and gave Meyer an instrument, reciting the demand and tender and assigning the mortgage upon the condition that it be approved by the District Court, not only as to "legality," but also as to "propriety," and specifically making reservation that it should—"not violate the rights of any participation certificate holders" (F. 85).

The matter was heard on April 10, 1944, the same day as the hearing on confirmation of the plan. Meyer claimed that as a result of the above transaction with the First Trust he was the owner of the mortgage; that he—not the "Participation" holders—was entitled to vote; that Dolan, therefore, was not entitled to vote his own "Participations" and accordingly there was not a two-thirds vote of that class. The District Court held that the demand was a "nullity"; that the First Trust was not compelled to assign the mortgage; that the assignment did "not deprive the owners of participation certificates who had not on April 10, 1944, been paid nor had payment tendered to them for their certificates with interest, of their right to vote upon or participate in the plan * * *" (F. 196). On that day no "Participations" had been paid, nor had payment been tendered to them. (F. 169)

The District Court permitted Dolan to vote his mortgage of $364,000 on the Main Building and his "Participations" amounting to $30,252 for the plan, and that being in excess of 66⅔% of that class, the plan was confirmed.

On appeal the Second Circuit has reversed the District Court in an opinion by Judge Jerome N. Frank, among other things, stating: F. 681

> "1. The lumping together, in one class, No. 7, of the two first mortgages was erroneous. That order was entered when the present plan was not before the court. We need not, therefore, consider whether a failure to appeal from a classification order, entered when a plan is before the court, precludes a later appeal from the order approving a plan, challenging the fairness of that plan, which raises the validity of the classification order. The error here was aggravated when the court approved a plan according very substantially different treatment of the two mortgages"

and that the assignment by the First Trust to Meyer—

F. 683

> "at once divested most of the certificate holders, including Dolan, of any interest in the mortgage * * * (and) There was nothing wrong in the fact that Meyer's purchase of the Annex Mortgage * * * prevented Dolan from getting control through an erroneous classification order.
>
> F. 685 Accordingly, the District Court erred in its order allowing the acceptances of the certificate holders to be counted and in refusing to consider Meyer's vote against the plan."

The Circuit Court has also reversed the District Court because of an issue involving the Second Mortgage Bonds, and also on the ground that full provision was made to the Merchandise Brokerage Corp., the only unsecured creditor, without the same provision being made to Bondholders. We will discuss these points under Subdivision 1 of "Reasons for Writ," infra.

REASONS RELIED UPON FOR THE WRIT

(These will be discussed separately infra)

(1-A) The Circuit Court has reversed an order of classification previously made by the District Court on an appeal from an order of confirmation when no appeal had been taken from that order of classification. This conflicts with the decision of the Seventh Circuit in *In re Austin Bldg. Corp.*, 96 Fed. (2d) 905.

(1-B) The reversal of the District Court on the ground that classifying the two first mortgages in the same class was erroneous, is in conflict with the decision of the Seventh Circuit in *In re Palisades-On-The-Desplaines*, 89 Fed. (2d) 214.

(1-C) The Circuit Court considered on this appeal issues which were not litigated in the District Court, or even brought to that Court's attention. While no one will disagree that such is the general rule, there may be doubt as to its application in reorganization cases. If so, it is in conflict with the decision of the Seventh Circuit in *In re Waern Bldg. Corp.*, 145 Fed. (2d) 584.

(1-D) The Circuit Court has reversed the District Court on the ground that "other" Bondholders did not receive notice. (The fact is they did receive notice. This will be discussed in Sub. 3 infra.). However, the decision of the

Circuit Court on this point is in conflict with the holding of the Ninth Circuit in *In re Mason v. Eldorado Irrigation District*, 144 Fed. (2d) 189, and with the decision of the Fourth Circuit in *In re Pullman Coach Co. v. Eshelman, et al.*, 1 Fed. (2d) 885.

(1-E) The Circuit Court has held that the order of classification must be made when a plan of reorganization is before the court. That holding is in conflict with the decision of the Fifth Circuit in *In re Texas Hotel Securities Corp.*, 87 Fed. (2d) 395.

(1-F) The Circuit Court has reversed the District Court on the ground that the successor in interest of issuer of "Participations" is entitled to vote the claim, i.e.—that Meyer, as successor in interest to the First Trust, the issuer of the "Participations," was entitled to vote the mortgage even though the "Participation" holders were the "creditors" who had filed the claims. This is in conflict with the decision of the Third Circuit in *Herbert v. Apartments Corp.*, 98 Fed. (2d) 662 (cert. den., 305 U. S. 640).

2. In making its decision that classifying the two first mortgages in one class was erroneous and citing *Group of Investors v. Milwaukee R. Co.*, 318 U. S. 523, 562, and *Ecker v. Western Pac. R. Corp.*, 318 U. S. 448, 482, the Circuit Court has erroneously interpreted applicable decisions of this Court.

3. The Circuit Court has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision, by reversing the District Court on the following issues which were never raised or brought to the attention of the District Court:

A. The "lumping" together of the two first mortgages in one class.

B. That the classification order was entered when the present plan was not before the court. (The facts are to the contrary. The present plan as amended was before the court (F. 239).)

C. That because of the alleged erroneous classification, Meyer, through his maneuver with the First Trust, was entitled to vote Dolan's "Participations."

D. That no hearing was had to evaluate the bonds.

E. That "other" Bondholders had no notice of the hearing regarding the evaluation of the bonds.

F. That the claim of Merchandise Brokerage Corp. was not entitled to full provision without the same provision being made to Bondholders.

4. The Circuit Court has decided important questions of bankruptcy law which have not been, but should be, settled by this Court, many of which questions are both novel and important.

5. This reversal of the District Court by the Circuit Court is palpably erroneous on its face.

6. The Bankruptcy Act and the general principles of equity jurisprudence have been so construed and applied by the Circuit Court as to permit a miscarriage of justice.

REASONS RELIED UPON FOR THE WRIT

I.

The decision of the Second Circuit Court of Appeals is in conflict with decisions of other Circuit Courts on questions of Federal Bankruptcy Law.

(1-A) The Second Circuit Court in the instant case has stated: F. 681

> "The lumping together in one class * * * of the two first mortgages was erroneous."

In so saying the Second Circuit is in effect reversing on this appeal the order of classification made Apr. 30, 1943, from which no appeal had been taken. In fact, the issue was never even raised before the District Court. At no time in the District Court did Meyer complain that the two first mortgages should not be in the same class. In fact, his maneuver with the First Trust was predicated on the proposition that the mortgages would be in one class and that he, if he could acquire the vote of all "Participations," would preclude Dolan from voting two-thirds of that class.

Assuming for the moment, therefore, that the issue had been raised, which indeed it had not been, the decision of the Second Circuit is in conflict with the decision of the Seventh Circuit in *In re Irving-Austin Bldg. Corp.*, 96 Fed. (2d) 905, where an order of classification previously made was attacked on appeal from an order of confirmation. There the court said:

> "The court had already entered the order of classification, upon which there had been no direct attack. An order in a bankruptcy proceedings, from which appeal may be had, may be reviewed only upon an appeal from that order and not on an appeal from a subsequent order. Nor may a party refrain from direct attack by motion to modify or by appeal from an order and later collaterally attack the same by an appeal from a later order, in which the court overrules an objection attempting to raise a question disposed of by the previous order. *In re Trust No. 2988*

> *of Foreman Trust & Savings Bank*, 7 Cir., 85 Fed. 2d 942. This court cannot, upon an appeal from the order of confirmation, review the order of classification previously entered."

(1-B) The decision of the Second Circuit is also in conflict with the decision of the Seventh Circuit in *In re Palisades-On-The-Desplaines*, 89 Fed. (2d) 214, where the question of placing separate mortgages on twenty-two different parcels in the same class was attacked. While there it arose under Sec. 77B (c, Sub. 6), the language of the statute is precisely the same as the present Sec. 197 of the Act, which provides:

> "For the purposes of the plan and its acceptance, the judge shall fix the division of creditors and stockholders into classes according to the nature of their respective claims and stock."

There the Seventh Circuit said that these twenty-two mortgages were properly classified in one class.

Here we have two first mortgages on adjoining properties, a part of one hotel unit. Of course no reason has been urged or assigned by Meyer why they should be placed in a different class because he never raised the point in the District Court. (When the classification order was made the District Court relied upon the above Seventh Circuit case.) Furthermore and very important is the fact that when the classification order was made Meyer was a proponent of the motion and could not possibly have been a party aggrieved to appeal from the classification order, even if he had so desired. We will discuss this further in Sub. 3 infra.

(1-C) The Circuit Court has also reversed the District Court on the question of the value of the bonds, stating in its opinion that—

> "* * * The court erred. For there was no hearing at which evidence was taken that supported that finding."

Meyer on this appeal, in his brief before the Circuit Court (P. 12) raised the point that:

> "No notice of any hearing to consider the question of such evaluation was given to bondholders. Many persons besides Dolan and Meyer are holders of these bonds. Furthermore, the court denied counsel for other holders of these bonds the right which he requested to file objections" (F. 470).

We must assume from Meyer's brief and the argument of his counsel on appeal that what the Circuit Court means is that the bondholders had no notice of such hearing. There certainly were hearings, at which all matters brought to the Court's attention, were thoroughly discussed, including evaluation of the bonds—in fact there were four such hearings, April 10, April 11, April 29 and May 10, 1944. No bondholders complained that they did not receive sufficient notice, nor did they ask to put in any proof; nor did Meyer. He merely objected to the amount of the Court's evaluation (F. 508). He was represented by—not one, but two—counsel, Messrs, Langan and Bragaw, at all hearings and was heard at length on every objection they raised. Practically all bondholders were represented at these hearings (F. 506). That point was not called to the attention of the District Court, and was raised by Meyer for the first time on appeal.

This decision of the Second Court is in direct conflict with *In re Waern Bldg. Corp.*, Seventh Circuit, 145 Fed. 2nd 584. There on appeal from an order of confirmation an objecting bondholder for the first time raised an objection which he

had not raised before the District Court. The Seventh Circuit said:

> "Appellant attempts to thrust this objection in as an afterthought on this appeal. If appellant wished to complain of this aspect of the plan, he should have raised a specific objection before the referee and the court in order to have permitted a finding as to its validity. Since he did not, the objection may not be raised for the first time in this court."

(1-D) Furthermore it now would seem that on appeal Meyer has claimed that "other" bondholders did not receive notice and hence he is entitled to appeal because those "other" bondholders did not receive such notice. (The fact is, they did receive notice. We will discuss that in Subdivision 3, infra.)

Assuming, but not conceding, that such "other" bondholders had not received notice, as claimed by Meyer, nevertheless he made no such objection before the District Court. Even if he had, it still would not have afforded him a right of appeal on that ground. The decision of the Second Circuit is in direct conflict with the holding of the Ninth Circuit in *In re Mason vs. Eldorado Irrigation District*, 144 Fed. 2nd 189, where the court said:

> "Appellant claims notice of hearing of the final decree was without due notice to the creditors, but does not claim any harm suffered by himself because of this asserted omission * * *. The proposition is without merit."

It is also in direct conflict with the holding of the decision of the Fourth Circuit in *Pullman Coach Co. v. Eshelman, et al.*, 1 Fed. (2d) 885, where it was held that—

> "The only purpose of the requirement that there should be a petition and notice to creditors is to give creditors opportunity to be heard * * *. That purpose was met when the objecting creditor at a legal meeting of creditors entered upon a consideration and discussion of compromise without objection of lack of petition or due notice."

Meyer is the only objecting creditor and he was fully heard—four times—April 10, 11, 29, and May 10, 1944. (The entire minutes of these proceedings are in the Record, fols. 340-522.)

True, at the hearing on April 29, 1944, counsel for certain bondholders appeared and desired to intervene and file objections to the plan (F. 470), presumably on the ground that the bondholders should receive more than 50% of the face value. They were allowed to intervene but not allowed to file objections. However, the matter again came on to be heard on May 10, 1944, and these same objecting bondholders were heard again. The District Court then ruled that because they were already represented by a Bondholders' Committee and had taken no steps to withdraw their bonds from that Committee and there being no showing that the Committee was not able or willing to protect their interests, the District Court would consider those bonds as being represented by counsel for the Bondholders' Committee (F. 501-2). No appeal was taken by those bondholders from that ruling.

The Circuit Court has also reversed the District Court on the ground that provision in full being made to Merchandise Brokerage Corp., an unsecured creditor, without the same provision being made to bondholders was "clearly wrong." The facts are that the Merchandise Brokerage Corp. has a claim of $4,600, based upon notes executed by the tenant of

Debtor and guaranteed or endorsed by Debtor for merchandise sold to the tenant, which under the lease existing between Debtor and tenant, became the property of Debtor upon delivery of the same to tenant (F. 570).

All other general unsecured creditors had previously been paid in full. All plans of reorganization, including those of Meyer and the bondholders, have provided for payment in full to the Merchandise Brokerage Corp. No point was ever brought to the attention of the District Court that this provision was in any way improper and for the first time it was raised by Meyer on this appeal.

The Circuit Court, now considering that issue for the first time on this appeal from the order of confirmation, is in direct conflict with the foregoing decisions of the Seventh Circuit in *In re Waern Bldg. Corp.*, supra.

Point may now be made by Meyer that this particular issue was raised in the objections filed by him on April 10, 1944 (F. 302-3). If so, the point was not brought to the Court's attention, nor that of opposing counsel. The matter came on to be heard again on Apr. 11, again on Apr. 29 and again on May 10, and at no time did Meyer raise that objection.

The minutes of the various hearings have all been printed in the record (F. 340-522). As pointed out by the Seventh Circuit in *Maloney v. Brandt*, 123 Fed. 2nd 779:

> "Litigants are not entitled to hide a point in an obscure pleading and present it for the first time on review, but they should fully and fairly acquaint the trial court with all matters relied on."

(1-E) The Second Circuit has held; in the instant case:

> "That the order of classification was entered when the present plan was not before the court." F. 681

(P. 37, infra)

The fact is that the Trustee's plan, dated April 7, 1943, (See Appendix) was before the District Court, and this plan, as amended, is the plan that was approved and confirmed (F. 239). However, assuming that that was not so, this decision is in direct conflict with the holding of the Fifth Circuit in *In re Texas Hotel Securities Corp.*, 87 Fed. 2nd 395, where the court said:

> "The proof of claim as to ownership, amount and nature should first be made, and after its allowance and classification its right to vote if challenged should be considered in connection with the approval of the plan."

Neither was this point ever brought to the attention of the District Court.

(1-F) The Second Circuit in the instant case has held that Meyer, after this transaction with the First Trust, was entitled to vote Dolan's "Participations." The theory being that the First Trust had made a "valid voluntary assignment" and that under the terms of the certificates—"such an assignment at once divested most of the certificate holders, including Dolan, of any interest in the mortgage."

In his opinion Judge Frank points out that Dolan's "Participations" contained the provision—"that the company (referring to the First Trust) may take up and cancel this certificate at any time upon payment of the amount of principal and interest due herein." That is the only possible provision under which such a claim could be made (F. 120-23). The fact is, the "company" did not then and never has taken up Dolan's participations or paid for them. However, in any event, this decision of the Second Circuit is in conflict with the decision of the Third Circuit in *Herbert v. Apartments Corp.*, 98 Fed. 2nd 662 (cert. den. 305 U. S. 640). There the rights of participation holders were thor-

oughly discussed. As in the present case, the mortgage certificate is carefully drawn to avoid creation of a fiduciary relationship and merely creates that of principal and agent. The Third Circuit held that the certificate holders were—

> "In fact the beneficial or true owners of the rights in the mortgage. * * * They were the creditors within the purview of section 207 of the act. * * * That the mortgage company could not file a claim on behalf of all certificate holders. It lacks such authority, since it acts merely as agent. * * *"

II.

The Second Circuit Court has decided the question of classification in a manner probably in conflict and inconsistent with applicable decisions of this Court.

In making its decision that classifying the two first mortgages in one class was erroneous, the Circuit Court cites *Group of Investors v. Milwaukee R. Co.*, 318 U. S. 523, 562, and *Ecker v. Western Pac. R. Corp.*, 318 U. S. 448, 482.

Neither of these cases hold arbitrarily that placing two first mortgages in the same class is erroneous. In fact, it would appear quite to the contrary. The issue, of course, was not directly raised in either of these cases, but this Court did say in the *Ecker* case:

> "The important element is the allocation of securities so as to preserve to creditors the advantages of their respective priorities. That is to say, senior claims first receive securities of a worth sufficient to cover their face and interest before junior claims receive anything."

In the *Group of Investors* case, this Court said:

> "No fixed rule supplies the method for bringing two divisional mortgages into a new capital structure so that each will retain in relation to the other the same position it formerly had in respect of assets and of earnings at various levels. The question in each case is one for the informed discretion of the Commission and the District Court. We cannot say that the discretion has been abused here."

Neither has that discretion been abused in the instant case. Under the plan confirmed, the holders of "Participations" are being paid all of their principal in cash and one-half of all past due interest in cash. The entire balance of unpaid interest is being provided for by preferred stock (F. 201)—thus in all—full provision is being made for "Participations" (the total of this preferred stock would be about $46,000). The position of their lien was not being subordinated because of this provision as to preferred stock. Much to the contrary, it was being substantially improved. This preferred stock received preference over common stock to be issued to Dolan for past due interest on his mortgage. It was also preferred as to dividends over Dolan's common stock and had equal voting rights (F. 203). At the same time, the mortgage on the "Annex" being discharged and that property becoming a free asset, this preferred stock continued to remain a first lien on the "Annex" just as it had been in the past, except as to current liabilities of the New Company. It also became a lien on all the rest of the Debtor's assets.

Furthermore, the provisions with regard to this preferred stock were agreed upon by the holders of practically all "Participations" on March 18, 1944, at the time the plan was considered for approval (F. 271, 360).

The objections now made by Meyer arise solely because he seeks to place himself in the position of these "Participation" holders through the above recited transaction with the First Trust on April 1, 1944, when the plan was to come up for confirmation.

III.

The Second Circuit has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision.

The Circuit Court's reversals of the District Court are almost entirely on issues which were never raised or brought to the attention of the District Court, to-wit:

(A) The "lumping" together of the two first mortgages in one class.

(B) That the classification order was entered when the present plan was not before the Court. (The facts are to the contrary. The present plan, as amended, was before the Court) (F. 239).

(C) That because of the alleged erroneous classification, Meyer, through his maneuver with the First Trust, was entitled to vote Dolan's "Participations."

(D) That no hearing was had to evaluate the Bonds.

(E) That "other" Bondholders had no notice of the hearing with reference to evaluation of the Bonds.

(G) That the claim of the Merchandise Brokerage Corp. was not entitled to full provision without the same provision being made for Bondholders.

In considering on appeal for the first time issues not raised or brought to the attention of the District Court, the Circuit Court has departed from the accepted and usual course of judicial procedure.

3-A & B. As pointed out above, when the classification order was made on April 26, 1943, Meyer was in favor of the classification as made by the Court—not against it. At that time Meyer was for it because he was a proponent with the Onondaga Savings Bank (Dolan's predecessor in title) of the Trustee's plan dated April 7, 1943 (see Appendix). Meyer never claimed before the District Court that the mortgages should be separately classified, or that the "Participations" be refused a vote. That being what he desired at the time, naturally he was satisfied. No appeal having been taken, it became the law of the case.

A year later (March 18, 1944), the Trustee's plan was approved. Then on April 1, 1944, Meyer (after futile attempts to buy the first mortgage from the First Trust (F. 398)), made this demand, which everyone now, even the Circuit Court, concedes was a "nullity," and procured the instrument which conditionally assigned to him the mortgage owned by the "Participation" holders (F. 82).

3-C. He claims on appeal that said classification order and the order vesting power to vote in the "Participation" holders, to which he consented, if he did not request, was erroneous. The point was not made before the District Court. Both Meyer and the First Trust were parties to that proceeding. Obviously they were both satisfied with the District Court's classification. Meyer was in no way

misled or deceived. He made his demand on the First Trust for an assignment of the mortgage clearly on the theory that if he could vote that mortgage, it being in the same class with Dolan's mortgage, he could block the confirmation. Hence at the hearings on confirmation Meyer did not desire separate classification but, rather, desired a classification exactly as it was made.

Now, on appeal from the confirmation, he attacks the classification order for the first time. We believe the Circuit Court, in permitting Meyer to attack this classification, to which he not only acquiesced but was a proponent, has radically departed from the accepted and usual course of judicial procedure.

3-D. The Circuit Court has also reversed the District Court on the ground that no hearing was had at which evidence was taken to support the District Court's finding that 50% of the face value of the bonds was a fair value.

In the first place, the plan originally filed by the Trustee and sponsored by Meyer, made provision for only 25% of the face value in cash (p. ~~12 of~~ Trustee's plan in Appendix) 47, infra Through amendments offered by Dolan the provision was increased to 50% of their face value, together with the right to subscribe for common stock (F. 248, 205, 208). Meyer made the same proposal. The Bondholders' Committee, in its plan, was content with that valuation (F. 271, 147, 317) and on the eve of the approval of the plan this committee entered into an agreement to sell the bonds held by it to Meyer for 50% of their face value (F. 262). No one complained and even Meyer, at the time the plan was considered for approval, agreed that 50% of the face value was fair and equitable.

The District Court's valuation of the bonds was based, not only on the evidence in the solvency trial (in which

Meyer and the Bondholders' Committee participated), held just prior to confirmation of the plan, but upon considerable other evidence, including the plans of Meyer and the Bondholders' Committee (F. 317). Fifty dollars was their "goal" (F. 272). The Circuit Court said that: F. 686

> "The lower Court intimated that Meyer was in some way estopped because he had previously been ready to acquiesce in a plan alloting only 50 in cash to these bonds * * *. For the record indicates that Meyer was proposing a plan which would yield these bonds not only 50 in cash but a portion of that part of the new common stock * * *."

The proposals of both Meyer and Dolan accorded substantially the same treatment to Bondholders—$50 in cash and the right to buy common stock (F. 270). What the District Court meant was that Meyer should be satisfied to accept the same proposition that he was representing to the Court was "fair and equitable" in his proposals (F. 269, 272).

The District Court's opinion approving the plan said, among other things:

> "If upon presentation a majority of only one class fail to accept, I shall be inclined to make findings which can be readily found upon the evidence taken in the so-called insolvency hearing and the records in this case" (F. 272).

That opinion, together with notice of a hearing on confirmation, was mailed to all bondholders on March 25, 1944 (F. 273). That notice called a hearing for April 10, 1944. Because of a technical objection of Meyer (that Sec. 179 of the Act had not been complied with in that the date for

consideration of confirmation had been noticed prior to the time fixed for filing of acceptances) (F. 310, 343), the District Court directed that a second notice to the same effect be mailed on April 15, 1944, calling for a hearing on the confirmation for April 29, 1944. At both of these hearings practically all Bondholders were represented (F. 506).

If anyone had even suggested that Bondholders were entitled to additional notice, most certainly the District Court would have granted that additional time. The District Court was particular to avoid the possibility of any technical objections on appeal and noticed the matter for the second time because of Meyer's objection to non-compliance with Sec. 175 (F. 310, 343, 415). Bondholders did receive notice of what would be done. First, in the plan (F. 209); second, in the order mailed to them (F. 244); and third, in the opinion mailed to them (F. 273). These were mailed to them on two separate occasions; once on Mar. 25, 1944, calling the hearing for Apr. 10, and again on ~~Mar.~~ Apr. 15, 1944, calling the hearing for Apr. 29 (F. 310, 623). These notices also contained a provision that the hearing would be adjourned from time to time without further notice other than by the announcement of the adjourned date (F. 251). Hence they were all apprized of the hearing May 10, 1944.

When confirmation of the plan was being considered and the Court made its finding on the issue, Meyer merely took exception to that finding (F. 508); he did not complain that he had no notice of a hearing on the question, nor that he be permitted to introduce more evidence. Now on appeal from the order of confirmation he urges that he should have been permitted to put in more evidence and the Circuit Court has agreed with him.

The consideration by the Circuit Court of this issue, not raised before the District Court, is a departure from the accepted and usual course of judicial procedure. It has long

been a rule of practice that a reviewing court may not consider errors not called to the attention of the lower court where such matters do not concern the jurisdiction of the court. It would be manifestly unfair to hold that the District Court had erred in a matter it had not considered. This should apply here even more because Meyer had had four distinct opportunities to raise this issue because the confirmation was before the District Court on four separate days—April 10th, 11th, 29th and May 10th. Meyer was represented by two counsel and heard at length and at no time did he claim he needed more notice and desired to put in more evidence.

(3-F) This is also true with regard to the reversal by the Circuit Court of the District Court's order of confirmation on the ground that the plan made full provision for the Merchandise Brokerage Corp. No such issue was raised by Meyer at any of the hearings on confirmation and he certainly had ample opportunity to do so.

IV.

The Circuit Court has decided important questions of Federal Bankruptcy Law which have not been, but should be, settled by this Court, and many of these questions are both novel and important.

1. Is the "lumping" together of the two first mortgages in one class illegal?

2. Must an order of classification be made at a time when a plan of reorganization is before the court?

3. May the validity of a classification order previously made be challenged on an appeal from an order of confirmation?

4. Is a plan unfair and illegal if creditors in the same class receive different treatment, even though there is no violation of the priority rule, particularly when the objecting creditor is receiving better treatment than other creditors?

Here Meyer complains that Dolan on his mortgage was receiving different treatment than the "Participations." Dolan's mortgage merely remained a lien exactly as at present as to principal. The principal of the "Participation" mortgage was being paid off in cash. For the past due interest on Dolan's mortgage he was to receive common stock. For the past due interest on the "Participation" mortgage the holders were to receive one-half of the past due interest in cash, the other half in preferred stock which in all respects was a prior lien to common stock and had equal voting privileges. Thus the "Participations" were receiving better treatment than Dolan's mortgage. (F. 200-12)

5. "Participation" holders admittedly are creditors within the meaning of Sec. 107 of the Act. Upon the commencement of a reorganization proceeding does the original issuer of "Participations" have any rights in the proceeding because of any provisions contained in the certificates, particularly after the holder has filed his claim and it has been allowed. Can that issuer exercise any powers or privileges contained in the certificate after the filing of a petition in bankruptcy and the filing of a claim by the "Participation" holder?

The Second Circuit in *In re Castle Apartments, Inc.*, 113 Fed. (2d) 762, has said that the issuer of such participations would not have a right to vote even if "they as trustees have been given all the rights of an absolute owner under a declaratory trust."

Again, the Second Circuit in *In re Blinrig Corp.*, 114 Fed. (2d) 100, held that the issuer of such "participations" could not block the acceptance of a plan, even if the issuer was—"vested with all the rights and powers of an absolute owner of the property."

6. Does such "participation" holder have a vested property right in his participation upon the commencement of bankruptcy proceedings of which he cannot be divested without his consent? Can the issuer of the participation say—"John Doe has given me the amount due on your claim. Give John Doe your claim"?

7. Does not that participation holder have a property right in that participation which, because of other interests he may have in the proceeding, attach a value to his participation far in excess of its face value?

8. If two parties in a bankruptcy proceeding enter into a transaction and agree that it shall be subject to the approval of the court as to legality and propriety, does the court become the final arbitrator and does an appeal lie in favor of the party who is dissatisfied with the court's decision?

9. The Second Circuit held in the instant case: F. 684

> "There can be no bad faith in buying up claims in order to frustrate the obtaining of acceptances from members of a class invalidly constituted."

Is bad faith in buying up claims to be permitted in such a case?

10. Can a creditor who was present at a hearing appeal on the ground that "other" creditors received no notice and were not heard, particularly when he had not raised that objection before the lower court?

11. Section 180 provides:

> "The order of the judge approving the plan * * * shall not affect the right of the debtor, a creditor, indenture trustee, or stockholder to object to the confirmation of the plan."

Does this mean that a creditor who had filed objections and been fully heard at the time the plan was considered for approval and had not appealed from the order of approval, is entitled to file different objections at the hearing on confirmation and then appeal from an adverse decision?

12. Can a creditor who was fully heard and consented to approval of the plan later sell his claim to a third party and place that third party in position through the ownership of that claim to raise objections to the confirmation of a plan which his predecessor in title had approved.

In the instant case, the First Trust on the approval of the plan on Mar. 18, 1944, was fully in accord with Dolan (F. 271, 360). On Apr. 1, 1944, the transaction with Meyer took place and on Apr. 10, 1944, Meyer, claiming to be the owner of the First Trust mortgage, raised entirely new objections to the confirmation (F. 392-304).

V.

The decision of the Circuit Court is palpably erroneous on its face.

If Meyer did not effectively acquire the First Trust mortgage through the assignment from the First Trust then the whole basis of the Circuit Court decision fails. Prefacing the opinion of Judge Frank the Circuit Court recites that on Apr. 1, 1944, the demand was made on the First Trust for an assignment of the mortgage to Meyer under Sec. 275 of

the New York Real Property Law; the tender by Meyer to the First Trust of the balance due on the mortgage; the execution of the assignment and quotes the provision thereof;

> "that the question of whether or not acceptance of such payment and the giving of this assignment is proper and legal under all circumstances be presented for determination to (the District Court) * * * on or before May 1, 1944 * * * and the assignment shall be void and of no effect if the court determines the giving thereof improper and unlawful by reason of violating the rights of any participation holders or otherwise * * *"

That on Apr. 6, 1944, the First Trust filed its petition, referring to the demand, tender and assignment and asking the District Court for a determination; that the District Court held the demand was a "nullity"; that the First Trust was not compelled to assign; that an order was made among other things providing:

> "* * * SECOND: That the First Trust & Deposit Company was not obligated to comply therewith and that the assignment of the mortgage given by the above-named debtor, The Onondaga Hotel Corporation, dated December 21, 1928, and recorded in the Onondaga County Clerk's Office December 27, 1928, must be considered a voluntary sale and not one in compliance with the aforesaid demand. THIRD: That this Court, subject to the provisions in Paragraph 'FIFTH' thereof, makes no disapproval of the assignment of said mortgage as a voluntary act and, subject to the provisions in Paragraph 'FIFTH' hereof, consents thereto. FOURTH: That the acceptance of all participation certificate holders—which have been filed prior to this hearing

> —be deemed to have been filed as of April 5, 1944. FIFTH: That the approval given by this Court to said assignment as hereinbefore set forth does not and shall not deprive owners of participation certificates, who had not on April 10th, 1944, been paid nor had payment tendered to them for their certificates with interest, of their right to vote upon or participate in the plan presented by T. Frank Dolan, Jr., under date of February 24, 1944, which plan is now before this Court for confirmation."

In his opinion Judge Frank says: F 683

> "Meyer effectively acquired that mortgage through his purchase and the assignment thereof on April 1, 1944. * * * For, as the court below said, the First Trust made a valid voluntary assignment; * * * True, the assignment was conditional; but, since the court below correctly held that that condition was satisfied, it should have held the assignment effective as of April 1, 1944, the day it was executed."

First, the District Court did not hold that it was a "voluntary" assignment. What it did hold is that it made no disapproval of the assignment and consented thereto "provided" that it did not deprive the owners of the participations who, on April 10, 1944, had not been paid nor had payment tendered to them, of their right to vote upon and participate in the plan (F. 196).

Admittedly the assignment was conditional and predicated upon the very proposition that it should not violate the rights of any "Participation" holders (F. 85). Likewise, the decision of the District Court specifically states that it made no disapproval of the assignment "provided it should

not deprive the owners of 'Participations' * * * of their right to vote" (F. 197).

Sec. 198 provides:

> "An indenture trustee may file claims for all holders * * * of securities issued pursuant to the instrument under which he is trustee, who have not filed claims; provided, however, that in computing the majority necessary for acceptance of the plan, only the claims filed by the holders thereof, and allowed, shall be included."

The First Trust was either an agent or a trustee. If it was an agent, it had only the rights specified in the "Participations"; if it was a trustee it was bound by the above provision, and Meyer, by obtaining the assignment, could be in no better position than the First Trust was.

Judge Frank in his opinion says: F. 683

> "Under the terms of the certificates, such an assignment at once divested * * * Dolan of any interest in the mortgage."

Neither the assignment, the certificate, nor the mortgage extends any such power to the First Trust—least of all to Meyer, a third party. The "Participations" are absolute assignments of undivided shares in the mortgage (F. 120). The right "to take up and cancel" is one thing—the right to divest a "Participation" holder of his interest in the mortgage is another. Even so, on Apr. 10, 1944, the day fixed for voting, the "Participations" had not been taken up and cancelled (F. 169). Dolan's right to vote his claim, based on his "Participations," was not affected by the transaction.

VI.

The Bankruptcy Act and the general principles of equity jurisprudence have been so construed and applied by the Circuit Court as to permit a miscarriage of justice.

Dolan was not a party to the deal between Meyer and the First Trust, but his rights were being seriously affected. He owned a share in that mortgage, which, together with his other holdings, aggregated in excess of the two-thirds necessary to put through the approved plan. He was not interested in mere payment of the amount due on his share. He was more interested in the voting rights to which it was entitled. Neither Meyer, nor any third party, had a right to divest him of that vested right by merely paying the face amount of his share to some other person and saying—"I gave the First Trust the amount of your claim and I'm going to vote it against you." No law or equity extends such privilege, nor does the mortgage "Participations." The District Court knew this. To hold otherwise would have deprived Dolan of his property without due process of law. Meyer was attempting to acquire the whole mortgage for the sole purpose of voting—the very same reason why Dolan had previously acquired his "Participations" in that mortgage.

Is there any equitable reason why Meyer should be permitted to capitalize on Dolan's investment; is it fair or equitable for Meyer to say that he is entitled to the benefits of Dolan's purchase of "Participations" in January, 1944, any more than Dolan should be permitted to claim that he is entitled to vote the various securities purchased by Meyer from time to time in these proceedings?

Admittedly, the First Trust had no vote as issuer of these "Participations," then on what theory is Meyer entitled

to vote if he finds himself an assignee of whatever interest the First Trust had?

Let us assume that Dolan owns 100 shares of preferred stock in a corporation, callable at par at any time. A meeting of stockholders is called. Meyer goes to the corporation and says: "I want to vote Dolan's stock at this meeting. Here is the callable price of his stock." The corporation says: "Dolan has voting rights, and we are in doubt as to the legality and propriety of your demand. We will let the District Court decide it." The decision is put up to the Court on the day of the meeting. The Court rules: "Whatever you do with Meyer you do not affect Dolan's right to vote at this meeting." No one will dispute but that such a ruling would be correct. The transaction at bar is similar, assuming, without admitting, that in view of these reorganization proceedings the First Trust had the right to "take up and cancel" the "certificates" (F. 123). Dolan's certificates are still outstanding and have not been taken up or canceled (F. 169).

The First Trust did not purport to "sell" the mortgage to Meyer. It was so stated to the District Court by counsel for the First Trust, who drew the assignment (F. 357, 388). The assignment itself clearly points out that it was merely complying with the demand made by Meyer under Sec. 275 of the New York Real Property Law. There is no language in the assignment which indicates that it was in any way a "sale" (F. 83). To the contrary, it clearly indicates that it was an involuntary act on the part of the First Trust and both its legality and propriety were left to the decision of the District Court (F. 85).

The legality and propriety came on to be heard by the District Court on April 10, 1944, at the same time as the hearing on confirmation. The transaction, by its very

terms, could not have been consummated prior to April 10, 1944.

In its application to consider the matter the First Trust merely recited the bare facts and stated—"Petitioner desires and applies for a determination of the matters and questions which such conditions provide shall be presented to and determined by this Court." The First Trust did not say—"This is what we want to do," well knowing that if it did it would have violated Dolan's rights as a "Participation" holder.

This move of Meyer was not to protect any interests he had in the proceedings but, rather, to block Dolan's plan (F. 391). At that time Meyer's only holdings were 53 bonds and 1,700 shares of stock (F. 533-37). The stock had been eliminated by a previous determination of insolvency (affirmed by Circuit Court Dec. 11, 1944). As to the bonds, his plan provided for payment of 50% of the face value and rights to subscribe to stock the same as Dolan's plan. What was fair and equitable for all bondholders on March 18, 1944, should certainly be considered fair and equitable on April 10, 1944, particularly by Meyer. That is what the District Court had in mind when it said Meyer's position was "inconsistent" (F. 508).

At the time the plan was up for approval everyone was in substantial accord with Dolan's proposals, except, of course, Meyer (F. 271).

Meyer accepted the assignment, knowing that the District Court was to be the arbitrator. He was not satisfied with the decision of the arbitrator and therefore appealed. Counsel for the First Trust understood that the decision of the District Court was final and that no appeal would lie therefrom (F. 391).

The District Court had the right to take into consideration, not only the legal rights, but also the equitable rights of the parties. The District Court had the right to assume that third parties might buy securities involved in these proceedings and that those parties would be buying those securities with such rights as might be fixed by the court from time to time in the proceedings. Thus, on Mar. 18, 1944, when the District Court approved the amendments to the Trustee's plan proposed by Dolan and disapproved those proposed by Meyer, it was clear to Meyer that Dolan would be in position to vote his plan through. To block Dolan, Meyer grasped at the only remaining straw—to compel the First Trust to give him some kind of an instrument upon which he could make some claim. Hence the demand on the First Trust and the assignment of the mortgage. Obviously, Meyer could not buy Dolan's "Participations", at least, not for face value, and it is improbable that prior to Apr. 10, 1944, he would be able to buy very many of the other "Participations." He needed the vote of all of them by Apr. 10, 1944. He therefore made this demand on the First Trust which now everyone concedes was an illegal act and this the Circuit Court has passed over, saying—

> "We need not consider the validity of the demand * * *." F. 683

In other words, the ends justified the means even though the means admittedly was illegal.

What, in effect, the Circuit Court has done is to grant to Meyer the right to vote claims in bankruptcy owned by Dolan. The Circuit Court has held that Meyer could divest Dolan of his interest in the mortgage without his consent. It has granted to Meyer the right to vote the mortgage by virtue of this assignment from the First Trust when even admittedly the First Trust had no such vote. The Bank-

ruptcy Act and the general principles of jurisprudence have been so construed and applied by the Circuit Court as to permit a miscarriage of justice.

VII.

This petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIS H. MICHELL,
Attorney for Petitioner, T. Frank Dolan, Jr.
Office and P. O. Address,
821 Onondaga County Savings Bank Bldg.,
Syracuse, New York.

Dated: February 26th, 1945.

GEORGE R. FEARON,
Attorney for Petitioners, Laurence Sovik and
Merchandise Brokerage Corporation,
Office and P. O. Address,
930 University Building,
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COSTELLO, COONEY & FEARON, *of Counsel*,
Office and P. O. Address,
930 University Building,
Syracuse, New York.

APPENDIX TO PETITION FOR CERTIORARI
PROPOSAL OF AMENDED PLAN BY TRUSTEE

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF NEW YORK

IN THE MATTER OF THE ONONDAGA HOTEL CORPORATION, *Debtor.*	In Proceedings for the Reorganization of a Corporation, No. 27263

H. LOOMIS MURRAY, Trustee of The Onondaga Hotel Corporation, the above named Debtor, has prepared and proposes the annexed Amended Plan for the reorganization of said Debtor.

Dated: Syracuse, New York,
April 7, 1943.

Respectfully submitted,

H. LOOMIS MURRAY,
Trustee.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF NEW YORK

IN THE MATTER OF THE ONONDAGA HOTEL CORPORATION, *Debtor.*	In Proceedings for the Reorganization of a Corporation, No. 27263

AMENDED PLAN OF REORGANIZATION INVOLVING TRUSTEE'S CERTIFICATES, MORTGAGES, SECURED BONDS, CONTINGENT CLAIM AND COMMON STOCK

AMENDED PLAN OF REORGANIZATION FOR THE ONONDAGA HOTEL CORPORATION, THE ABOVE NAMED DEBTOR

HISTORY OF THE DEBTOR CORPORATION

The Debtor is a New York State Corporation which was formed on March 1, 1927, by the consolidation of the "Onondaga Hotel Corporation," incorporated August 8, 1908, and the "Onondaga Annex Corporation," organized on March 26, 1914.

The capital stock of the Debtor consists of 10,000 shares of common stock of no par of which 9,997 shares are issued and outstanding.

It owns certain hotel properties situate on the northwest corner of South Warren and East Jefferson Streets in the City of Syracuse. These consist of the main hotel building erected by the "Onondaga Hotel Corporation" and put in

operation in 1910, and the so-called "Annex"—built by the "Onondaga Annex Corporation" in 1914—which adjoins and is connected with the main building on its north side.

It also owns the furniture, fixtures, equipment and other personal property in these two buildings, having acquired the same from its lessor in September, 1936.

On or about December 5, 1938, "The Onondaga Company," which had been the Lessor of the Debtor's property for many years, filed a petition in the United States District Court for the Northern District of New York, under Section 77B of the Federal Bankruptcy Act and thereafter continued in possession of the Debtor's properties until December 1, 1940.

On January 16, 1939, the Debtor filed in the United States District Court for the Northern District of New York a petition for reorganization under Chapter X of the Federal Bankruptcy Act. This petition was approved by the Court on January 20, 1939, and on January 21, 1939, the undersigned, H. Loomis Murray, was appointed Trustee of the Debtor and, having qualified as such, has ever since continued to act in that capacity.

On December 1, 1940, the Trustee took possession of the Debtor's properties which are now being operated by the Knott Corporation by virtue of a contract with the Trustee.

DEFINITIONS

The following terms when used in the Amended Plan shall, unless the context otherwise requires, have the following meanings, respectively:

Debtor: The Onondaga Hotel Corporation, a corporation organized under the Laws of the State of New York.

Chapter X: Chapter X of the Act of Congress relating to bankruptcy.

Reorganization Proceeding: The proceeding for the reorganization of the Debtor, commenced the 16th day of January, 1939, under Chapter X and now pending in the District Court of the United States for the Northern District of New York entitled "In the Matter of The Onondaga Hotel Corporation, Debtor, In Proceedings for the Reorganization of a Corporation, No. 27263."

Court: The District Court of the United States for the Northern District of New York, acting in the Reorganization Proceeding, which term also applies to the Judge of the Court or the Referee in Bankruptcy at the time in charge of or hearing any part of the Reorganization Proceeding.

Trustee: H. Loomis Murray, appointed Trustee of the Debtor in this reorganization proceeding, or his duly appointed successor or successors.

Trustee's Certificates: Certificates of indebtedness heretofore issued by the Trustee pursuant to and in accordance with an Order of the Court dated the 26th day of May, 1941, and entered in the United States District Clerk's Office on the 18th day of June, 1941, which are now due and outstanding.

Onondaga County Savings Bank Mortgage: Mortgage executed and delivered to it by Onondaga Hotel Corporation dated October 1, 1908, due October 2, 1908, upon which there is due the principal sum of $364,000 with unpaid interest thereon from April 10, 1937.

First Trust & Deposit Company Mortgage: Mortgage executed and delivered to it by "The Onondaga Hotel Corporation," dated December 21, 1928, payable one year after

date, upon which there is now due $190,000 with interest from May 1, 1937.

First Consolidated Mortgage Bondholders: Owners of bonds issued and outstanding under a certain Trust Indenture executed and delivered to The Syracuse Trust Company as Trustee under date of October 1, 1908, by Onondaga Hotel Corporation, the total face amount of such outstanding bonds being $233,000 with interest thereon since October 1, 1936.

Bondholders' Committee: John Nash, Schuyler Black, Joshua Bachman, Edward A. O'Malley, C. Hamilton Sanford, or the duly appointed successors of any of the aforesaid persons composing a Committee representing certain bondholders who have or may deposit their bonds with said Committee under a Deposit Agreement dated the 19th day of December, 1938.

New Mortgage: New mortgage to be given by The Onondaga Hotel Corporation to owners of outstanding Trustee's Certificates at the time of the consummation of the Amended Plan.

Contingent Creditor: Claim of contingent creditor as hereinafter set forth.

Old Stock: Stock of the Debtor Corporation consisting of 10,000 shares of No Par Value Common Stock of which 9,997 shares are issued and outstanding.

Old Stockholders: Owners of such old stock.

New Stock: Stock to be issued by the Debtor Corporation.

New Stockholders: Such persons as shall become owners of new stock to be issued by the Debtor.

Debenture Notes, Series "A": Unsecured notes to be issued by The Onondaga Hotel Corporation to the Onondaga County Savings Bank and First Trust & Deposit Company.

Debenture Notes, Series "B": Unsecured notes to be issued by The Onondaga Hotel Corporation.

Net Profits: Net profits of The Onondaga Hotel Corporation and/or its successors, shall be determined as follows, viz: From a total income of it and its successors from the date of the consummation of the Amended Plan shall be deducted all operating and other expenses of every name and nature, including the constant amortization of the Onondaga County Savings Bank mortgage and the First Trust & Deposit Company mortgage. To the balance thus obtained shall be added back the following items of expense: Depreciation, obsolescence, interest on Debenture Notes, Series "B", if earned and included among the expenses, and all compensation of every name or nature for management except that paid to local employees, provided, however, that a fee not to exceed 3% of the room rents shall be allowed for supervisory management of the character as is now being provided by the present management. From this total the Federal Income and Excess Profits Tax shall be deducted and the amount then remaining shall be the net annual profits of The Onondaga Hotel Corporation and/or its successors for the purpose of determining the share of the net profits which is to be used in additional amortization of Debenture Notes, Series "A", and liens as herein provided.

Board of Directors: New directors of the Debtor as hereinafter provided for.

Confirmation of Amended Plan: The entry by this Court of an Order confirming the Amended Plan in accordance with Chapter X.

Consummation of the Amended Plan: The making available of the new securities, notes and cash for distribution and payment pursuant to the Amended Plan, and the execution of all other provisions and the accomplishment of all other things contained or provided for in this Amended Plan and in the orders of the Court in aid of consummation thereof.

TREATMENT OF TRUSTEE'S CERTIFICATES

All Trustee's Certificates outstanding at the time of the consummation of the Amended Plan, together with interest thereon, shall be paid or payment provided for and secured as hereinafter set forth.

CLASSES OF CREDITORS AND STOCKHOLDERS OF THE DEBTOR

Class 1: Holders of claims for wages earned within three (3) months prior to the filing of the petition of the Debtor, praying that proceedings be had under Chapter X, not in excess of six hundred ($600.00) dollars per person.

Class 2: The United States with respect to claims for taxes and customs duties against the Debtor.

Class 3: The United States with respect to claims against the Debtor, other than claims for taxes and customs duties.

Class 4: The State of New York and any other political subdivision thereof with respect to claims for taxes against the Debtor, except claims for real estate taxes.

Class 5: The State of New York and any other state or political subdivision thereof with respect to claims for real estate taxes.

Class 6: Any state or political subdivision thereof with respect to claims against the Debtor, other than claims for taxes.

Class 7: The Onondaga County Savings Bank and the First Trust & Deposit Company.

Class 8: Owners of First Consolidated Mortgage Bonds.

Class 9: Holder of the contingent claim hereinafter set forth.

Class 10: Old stockholders.

ASSETS OF TRUSTEE AND DISPOSITION THEREOF

The Onondaga Hotel Corporation shall acquire from the Trustee all his assets save cash on hand.

The value of the accounts receivable and of the items which are carried upon the Trustee's books of account under the title of "Prepaid and Deferred Expenses," consisting of prepaid insurance, prepaid telephone rental, licenses and City taxes or any other items of this nature, shall be determined by independent accountants whose selection shall be approved by the Court and whose services shall be paid for by the Trustee.

The inventory of the Trustee consisting of consumable supplies, such as food, beverages, fuel and lamps, shall be purchased by The Onondaga Hotel Corporation at the book value as determined by the accountants.

The valuation placed upon said accounts receivable, consumable supplies and prepaid and deferred expenses shall be subject to the approval of the Court; and any sums due the Trustee from the Onondaga Hotel Corporation for the purpose of acquisition of the foregoing accounts, supplies

and items shall be paid to him by The Onondaga Hotel Corporation upon the consummation of the Amended Plan, from the new funds to be paid into The Onondaga Hotel Corporation as hereinafter set forth.

From the funds of the Trustee arising from cash, receipts from sale of his assets to the Debtor and all other sources, there shall be paid the following items:

1. The expenses, costs and allowance of this proceeding as the same shall be judicially determined.

2. The Trustee's pro rata share of any taxes unpaid by him up to the date of the consummation of the Amended Plan and his cessation of the operations of the property of the Debtor, save any unpaid taxes for years prior to January 1, 1943, which are or may be claimed due by the United States of America or the State of New York, which taxes, if any, shall be assumed and borne by The Onondaga Hotel Corporation.

   The Trustee's share, if any, of taxes due the United States Government or the State of New York—exclusive of real estate taxes—from January 1, 1943, to the date of the consummation of the Amended Plan, shall be calculated or estimated and paid into the office of the Clerk of the United States District Court subject to further order of the Court. Any sums so paid, if the same shall be found not to be due to the United States or said State, shall be refunded to The Onondaga Hotel Corporation with instructions to pay same upon the principal of the Debenture Notes, Series "A."

3. All salaries, wages and accounts payable incurred by him as Trustee in the operation of the properties, save as hereinbefore excepted under No. 2.

4. To the First Mortgage Bondholders in full payment of the amount of bonds owned by them with unpaid interest thereon (being the principal sum of $233,000 face amount thereof, with interest from October 1, 1936), 25% of the principal amount of such bonds. In addition thereto, the Trustee shall pay to The Syracuse Trust Company, as Trustee of the Trust Indenture under which said bonds were issued, such sums as the Court shall allow for all services performed by it as Trustee and to be performed in the carrying out of this Amended Plan.

   Such sum as so allowed by the Court shall be in full satisfaction of the claim heretofore filed by said The Syracuse Trust Company as Trustee.

5. To the Merchandise Brokerage Corporation the principal amount of its contingent claim against the Debtor as such principal amount shall be determined by the Court. Upon the payment thereof said Merchandise Brokerage Corporation shall assign, transfer and deliver to The Onondaga Hotel Corporation all its right, title and interest in such claim. Any sums thereafter recovered by The Onondaga Hotel Corporation under such assignment shall be paid by it upon the principal of the Debenture Notes, Series "A."

6. To the holder of the outstanding Trustee's Certificates, the balance then remaining in his possession in reduction of such Trustee's Certificates and the interest accrued thereon.

ARTICLE I

Provisions Altering or Modifying the Rights of Creditors and Stockholders

The owner of the remaining Trustee's Certificates, after the payment thereon of the balance of the funds remaining in possession of the Trustee as hereinbefore provided for, upon consummation of the Amended Plan, shall receive in payment of the then balance a new mortgage for such amount which shall be given by The Onondaga Hotel Corporation and which shall be a first lien upon the "Main Hotel Building" and the real property upon which it stands, together with all furniture, fixtures, equipment and appliances of The Onondaga Hotel Corporation, and a second lien upon its property known as the "Annex" and the lands upon which it was erected.

Creditors in Class 7

The Onondaga County Savings Bank and the First Trust & Deposit Company shall cancel and surrender all claims for past due interest upon their respective mortgages up to the time of the consummation of the Amended Plan. They shall also reduce the principal amounts of such mortgages by 20% for which they shall receive Debenture Notes, Series "A", in a like amount, which notes are to be issued by The Onondaga Hotel Corporation as hereinafter provided.

The lien of said mortgages shall be so extended as to provide that the Onondaga County Savings Bank Mortgage shall be a second lien upon all furniture, furnishings, equipment and appliances customarily located in the "Main Hotel Building" of The Onondaga Hotel Corporation, and that of the First Trust & Deposit Company so that it shall be a second lien on its furniture, furnishings, equipment and appliances customarily located in the "Annex".

The terms of the Onondaga County Savings Bank Mortgage shall also be amended so as to contain a provision entitling it to the appointment of a receiver in any foreclosure action instituted by it thereon.

Creditors in Class 8

Holders of First Consolidated Mortgage Bonds shall receive in full payment of the face amount of their bond and accrued interest thereon, 25% of the face amount of such principal, or the sum of $528,250.00, there now being outstanding $233,000 par value of said bonds.

The Trustee shall also pay to The Syracuse Trust Company, the Trustee of the Indenture under which said bonds were issued, such sum as the Court shall determine in full for all past and further services rendered by it as such Trustee.

The manner of distributing such sum among the respective bondholders shall be provided for in the Order of the Court confirming said Amended Plan.

Debenture Notes, Series "A"

The Onondaga Hotel Corporation shall cause to be duly created, issued and delivered to the Onondaga County Savings Bank an unsecured note of the face amount of $72,800.00 and to the First Trust & Deposit Company an unsecured note of the face amount of $38,000.00, which notes shall be designated as Debenture Notes, Series "A".

These notes shall have a prior right to the payment of their principal and interest from the assets of The Onondaga Hotel Corporation over those designated as Debenture Notes, Series "B".

They shall be dated as of the date of the consummation of the Amended Plan, bear interest at the rate of 3% per

annum, payable March 1 and September 1 of each year and the balance remaining upon the principal, after payments thereon as hereinafter set forth under Article IX, shall be due and payable ten years from the date thereof.

Debenture Notes, Series "B"

In order that The Onondaga Hotel Corporation shall have a net working capital of $90,000.00, with which to conduct its business, it shall duly create and issue a series of unsecured Debenture Notes, known as Debenture Notes, Series "B", in the face amount of $80,000.00, for which it shall receive said sum in order to contribute $80,000.00 to said net working capital fund.

These notes shall be junior to the Debenture Notes, Series "A", as to any claim for principal or interest, upon the assets of The Onondaga Hotel Corporation. They shall bear date as of the date of the consummation of the Amended Plan, shall bear interest at the rate of 3% per annum, which shall be non-cumulative and payable only if earned and if by such payment the net working capital of The Onondaga Hotel Corporation is not reduced to less than $90,000.00.

"Net working capital" as used herein shall mean the difference between current assets and current liabilities. Current assets shall consist of cash, accounts and notes receivable, inventories of consumable supplies, marketable investments at market prices and any other assets which normally can or will be liquidated within one year.

Current liabilities shall consist of accounts and notes payable and accrual of expense items which must be paid within less than one year.

Class 10 Old Stock

The present capital stock, consisting of 10,000 shares of No Par Common Stock of which 9997 shares are issued, shall be eliminated.

New Stock and Rights of Old Stockholders

A new class of stock consisting of 10,000 shares of the par value of $1.00 each shall be created by The Onondaga Hotel Corporation, with the rights and priveleges hereinafter defined in Article XII of this Plan.

Each stockholder of the old stock shall have the choice of either of the following options, to wit:

(a) He may tender his old stock to The Onondaga Hotel Corporation which shall thereupon cause to be paid to him the sum of $2.00 per share for such stock; and such stock shall be cancelled; or

(b) For each share of his old stock he may subscribe to his proportionate share of New Stock, Debenture Notes, Series "B", and Paid in Surplus, at the rate of $1.00 per share for New Stock, $8.00 face amount of Debenture Notes, Series "B", and $1.00 as Paid in Surplus.

(c) Each person who shall elect to accept Option "b" shall also have the right to subscribe to his proportionate share of the New Capital Stock and Debenture Notes, Series "B", which shall remain unsubscribed for by reason of old stockholders accepting Option "a". Such subscriptions shall be on the basis of $1.00 per share for New Stock, $8.00 face amount of Debenture Notes, Series "B", and $1.00 as Paid in Surplus.

(d) Any portion of the New Stock and Debenture Notes, Series "B", then remaining unsubscribed for shall be disposed of to the old stockholders who have accepted

Options "b" and "c", in such manner as the Court may direct in the Order of Confirmation of the Amended Plan, on the same terms of payment as hereinbefore provided.

The time in which to make such elections and payments for such New Stock and Debenture Notes, Series "B", and contribution to the Paid in Surplus, shall be prescribed by the Court, which Order shall also contain such provisions as the Court shall deem proper in case of any such subscriber who shall fail to make prescribed payments.

Stockholders electing to take Option "b" shall present their old stock for cancellation.

If any of the stockholders shall fail within the time prescribed by the Court to make either of the elections herein provided for, his stock and all rights thereunder shall cease and be eliminated.

ARTICLE II

Property to Be Dealt with by Amended Plan

All property of the Debtor and its Trustee, of every name and nature, will be dealt with by the Amended Plan.

ARTICLE III

Provision for Payment of Administration Expenses and Other Allowances

Provision has heretofore been made in this Amended Plan for the payment of such administration expenses and other allowances as may be made by the Court.

All expenses incurred in the issuing of the Debenture Notes, Series "A" and "B", and incurred in the elimination of the old stock and the issuance of new stock, shall be

subject to the approval of the Court and shall be borne by the Trustee.

ARTICLE IV

Provisions for the Rejection of Executory Contracts

So far as now known, there are no executory contracts which are to be rejected.

All contracts of the Trustee which are unfulfilled at the time of the consummation of the Amended Plan shall be assumed by The Onondaga Hotel Corporation.

ARTICLE V

Claims to Be Paid in Cash in Full

Such claims as are to be paid in full have heretofore been set forth under "Assets of Trustee and Disposition Thereof."

So far as the Trustee knows, there are no unsecured claims of the Debtor which have not been paid except the contingent claim of the Merchandise Brokerage Corporation for which provision has been made as hereinbefore set forth.

ARTICLE VI

Creditors Not Affected by the Amended Plan and Provisions with Respect to Them

Unpaid taxes which are or which may be claimed due by the United States of America or the State of New York, if any, are not affected by this Amended Plan and shall be assumed and paid by The Onondaga Hotel Corporation, except such taxes as may accrue from January 1, 1943, to the date of the consummation of this Amended Plan. Pro-

vision has heretofore been made for the adjustment of any such taxes.

ARTICLE VII

Provisions for Classes of Creditors which are Affected by or Do Not Accept the Amended Plan by the Requisite Majority

None.

ARTICLE VIII

Provisions for Classes of Stockholders which Are Affected by and Do Not Accept the Amended Plan by a Requisite Majority

None.

ARTICLE IX

PROVISIONS FOR THE RETIREMENT OF INDEBTEDNESS

Debenture Notes, Series "A"

The Onondaga Hotel Corporation, its successors and/or assigns, shall pay each year upon the principal amount of such Debenture Notes, fifty per cent of its net annual profits, of which 50%, 33⅓% shall be paid to the Onondaga County Savings Bank or its assigns, and 16⅔% to the First Trust & Deposit Company or its assigns. Such amount shall be paid to said institution within ninety days of the close of the fiscal year of the corporation, provided, however, that The Onondaga Hotel Corporation shall have the privilege of prepaying any sum or sums on account of such net annual profits, on an estimated basis, at any time during the year and the credit for such prepayments shall be given upon the final yearly determination.

Debenture Notes, Series "B"

Said Notes shall become due and payable ten years after the date of their issuance, provided, nevertheless, that The Onondaga Hotel Corporation shall have the right to make payments on the principal amount thereof out of 50% of its net annual profits, if such payments shall not reduce its net working capital to less than $90,000.00.

New Mortgage

The New Mortgage shall bear date as of the consummation of the Amended Plan and be payable upon a 4% twenty-year monthly basis with monthly payments of both principal and interest, the basis of such payments being $6.06 per thousand per month, with the privilege to the mortgagee of paying any balance of the principal sum on thirty days' notice in writing.

In addition thereto, there shall be paid (after payment in full of the Debenture Notes, Series "A", as hereinbefore provided) fifty per cent of the net profits of The Onondaga Hotel Corporation.

Such amount shall be paid to the holder of said mortgage within ninety days of the close of the fiscal year of the corporation, provided, however, that The Onondaga Hotel Corporation shall have the privilege of prepaying any sum or sums on account of such net annual profits, on an estimated basis, at any time during the year, and the credit for such prepayments shall be given upon the final yearly determination of such profits.

Onondaga County Savings Bank Mortgage

The principal amount of such mortgage after being reduced as hereinbefore provided for, shall be upon a 4% twenty-year monthly basis with monthly payments of both

principal and interest, the basis of such payments being $6.06 per thousand per month, with the privilege of paying any balance of the principal sum at any time on thirty days' notice in writing.

In addition to such payments, after payment of the Debenture Notes, Series "A", and the New Mortgage, there shall be paid 33⅓% of the net annual profits of The Onondaga Hotel Corporation upon such principal, said payments to be made to the owner of said mortgage within ninety days of the close of the fiscal year of the corporation, provided, however, that The Onondaga Hotel Corporation shall have the privilege of prepaying any sum or sums on account of such net annual profits, on an estimated basis, at any time during the year, and the credit for such prepayments shall be given upon the final yearly determination of such profits.

First Trust & Deposit Company Mortgage

The principal amount of such mortgage after being reduced as hereinbefore provided for, shall be upon a 4% twenty-year monthly basis with monthly payments of both principal and interest, the basis of such payments being $6.06 per thousand per month, with the privilege of paying any balance of the principal sum at any time on thirty days' notice in writing.

In addition to such payments, after the payment of the Debenture Notes, Series "A", and the New Mortgage, there shall be paid 16⅔% of the net annual profits of the corporation upon such principal, said payments to be made to the owner of said mortgage within ninety days of the close of the fiscal year of the corporation, provided, however, that The Onondaga Hotel Corporation shall have the privilege of prepaying any sum or sums on account of such net annual profits, on an estimated basis, at any time during the

year, and the credit for such prepayments shall be given upon the final yearly determination of such profits.

Cancellation of Certain Bonds

The First Consolidated Mortgage Bonds now in possession of the Debtor shall be delivered to The Syracuse Trust Company as Trustee and shall be cancelled by it.

ARTICLE X

Means for the Execution of the Amended Plan

(a) The assets now held by the Trustee of the Debtor, together with those acquired from the Trustee as hereinbefore set forth, shall be vested in The Onondaga Hotel Corporation as reorganized.

(b) The Syracuse Trust Company as Trustee under the Trust Indenture dated October 1, 1908, securing the First Consolidated Mortgage Bonds, shall execute a cancellation of such Trust Indenture and a satisfaction of the lien thereof, which instrument shall be delivered to The Onondaga Hotel Corporation upon the deposit with said The Syracuse Trust Company as Trustee of the sum of $58,250.00, and the payment to it of such allowance as the Court may make.

(c) The necessary amendments to the Certificate of Incorporation of The Onondaga Hotel Corporation shall be executed and filed providing for the elimination of its present stock issue, the creation of the new stock issue of 10,000 shares of the par value of $1.00 each, the Debenture Notes, Series "A", the Debenture Notes, Series "B", the New Mortgage, the extension of the lien of the Onondaga County Savings Bank Mortgage and the First Trust & Deposit Company Mortgage, and the alterations and amendments to said

mortgages as herein provided, the provision with reference to net working capital, and in such other respects as the Court shall deem fitting in the Order approving the Amended Plan.

(d) Provisions for the issuance of new securities.

1. *New Stock:* The Onondaga Hotel Corporation shall create and issue new stock as herein provided for, consisting of 10,000 shares of the par value of $1.00 per share. Such stock and the Debenture Notes, Series "B", shall be subscribed and paid for as hereinbefore provided.
2. *Debenture Notes, Series "A":* The Onondaga Hotel Corporation shall issue the unsecured Debenture Notes, Series "A", in the form, substance and terms hereinbefore described.
3. *Debenture Notes, Series "B":* The Onondaga Hotel Corporation shall issue the unsecured Debenture Notes, Series "B", in the form, substance and terms hereinbefore described. Said notes shall bear a legend to the effect that they are subordinate as to the payment of principal and interest to the Debenture Notes, Series "A".
4. *New Mortgage:* The Onondaga Hotel Corporation shall create and deliver to the owner of the outstanding Trustee's Certificates at the time of the consummation of the Amended Plan, the New Mortgage, which shall contain the terms, provisions and requirements hereinbefore set forth.

(e) General Provisions.

1. The Trustee shall have general supervision over the Amended Plan and the consummation thereof, subject to the approval of the Court and he is specifically authorized to take such steps and proceedings as he may

deem advisable and as may be approved by the Court in order to effect consummation of the Amended Plan.

2. The form and terms of amendment to the Certificate of Incorporation of The Onondaga Hotel Corporation and the form and terms of the Debenture Notes, Series "A" and Series "B", and of the New Mortgage and of the amendment to the terms, conditions and provisions of the Onondaga County Savings Bank Mortgage and First Trust & Deposit Company Mortgage shall, in all respects not expressly defined or provided for in the Amended Plan, be determined with the approval of the Court.
3. The form and terms of any other documents or instruments executed with the consummation of the Amended Plan and the proceedings to be taken to consummate the same shall, in all respects not expressly defined in the Amended Plan, be determined by the Trustee and the interested parties. Such agreements shall be submitted to the Court for its approval or, in case of disagreement, to it for a decision thereon.
4. The Amended Plan describes in general outline the character of the New Securities, the means for the execution of the Amended Plan, and the precise terms and conditions are necessarily to be determined in accordance with the powers granted by the Amended Plan and under the supervision of the Court, to fit the facts and circumstances as they may exist from time to time during the consummation of the Amended Plan.
5. The Trustee with the approval of the Court may, insofar as it does not materially and adversely affect the interests of the creditors, stockholders or the Debtor, supply any defect or omission or reconcile any inconsistency in such manner or to such extent as may be necessary or expedient to carry out the Amended Plan effectively.

ARTICLE XI

Provision with Reference to the Selection of Directors

At the time of the consummation of the Amended Plan the Board of Directors of The Onondaga Hotel Corporation shall consist of seven members who shall be nominated by it but whose election or appointment shall be confirmed by the Court.

(a) Effectual provision is to be made in the by-laws of The Onondaga Hotel Corporation fixing the date of holding the annual meeting of stockholders, or in some other manner, in order that the Board of Directors, consisting as aforesaid, or successors appointed by them, will be entitled to continue in office for not less than ten months after the consummation of the Amended Plan. Thereafter the Directors shall be selected in accordance with the charter and by-laws of the Debtor and the Laws of the State of New York.

ARTICLE XII

Other Provisions and Reports to Be Included in Charter of the Debtor

(a) The amended Certificate of Incorporation of The Onondaga Hotel Corporation shall prohibit it from issuing non-voting stock. It shall also provide that the shares of new Common Stock shall be entitled to full and complete voting powers and shall have one vote for each share and shall be non-assessable.

During the period in which there shall be outstanding any of the presently existing mortgages, new mortgage, or Debenture Notes, Series "A", the amended Certificate of Incorporation shall also provide that no dividend shall be paid upon the capital stock outstanding if by so doing the net working capital of the corporation shall be reduced to less than $90,000.00, and that no decrease of capital shall

be made by retiring capital stock or any other means if by such decrease the amount of working capital shall be reduced to less than that sum. Subject to the limitations herein contained, the holder or holders of a share or shares of new Common Stock shall receive dividends thereon out of the earnings or surplus of The Onondaga Hotel Corporation when and as declared by the Board of Directors.

(b) The Certificate of Incorporation of The Onondaga Hotel Corporation shall also be amended so as to provide that it will not make or issue any notes, evidence of indebtedness or obligation of any nature which shall impose an interest or other charge upon it, without securing the written consent of the holders of the New Mortgage, Onondaga County Savings Bank mortgage and First Trust & Deposit Company mortgage.

(c) That periodic reports which shall include profit and loss statements and balance sheets prepared in accordance with sound business and accounting practice, shall be made not less than once annually to security holders by independent certified public accountants.

ARTICLE XIII

General Provisions

All provisions of the foregoing Amended Plan, which are applicable to The Onondaga Hotel Corporation, shall also be obligatory upon its successor and/or successors whether hereinbefore expressly stated or not.

The Trustee of the Debtor offers his services in an endeavor to carry out the reorganization of the Debtor in accordance with the Amended Plan, subject to the supervision of the Court, but he shall not assume any personal liability in connection with carrying out the Amended Plan except for the exercising of good faith in such endeavor.

(22)

IN THE

Supreme Court of the United States

OCTOBER TERM—1944

No. 1008

T. FRANK DOLAN, JR., LAURENCE SOVIK and MERCHANDISE BROKERAGE CORPORATION,
Petitioners,

vs.

ROBERT R. MEYER and MOKAVA CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The United States District Court for the Northern District of New York rendered an opinion (R. pp. 86-91) which is not officially reported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. pp. 222-230) is reported in 146 F. (2d) —— (C. C. A. 2d, 1945).

JURISDICTION

The decree of the Circuit Court of Appeals sought to be reviewed was entered February 2, 1945 (R. p. 231). Petitioners presumably invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code.

QUESTION PRESENTED

The question presented is whether, upon the facts in this case, the Circuit Court of Appeals for the Second Circuit erred in unanimously reversing two orders of the United States District Court for the Northern District of New York and in remanding the case to said District Court for further proceedings.

STATUTE INVOLVED

This is a proceeding for the reorganization of a corporation under Chapter X of the Bankruptcy Act, 52 Stat. 883-905 (1938), 11 U. S. C. §§ 501-676 (1940).

STATEMENT

This is a proceeding for the reorganization of the Debtor, The Onondaga Hotel Corporation, under Chapter X of the Bankruptcy Act. The proceeding was commenced on January 16, 1939 (R. pp. 18-24). Respondent Meyer did not cause the reorganization petition to be filed. The statement to that effect made by the petitioners (Petition, p. 2) is not supported by the record.

The Securities and Exchange Commission has taken no part in this proceeding. The order approving the plan dispensed with notice to that Commission (R. pp. 80-82).

On March 18, 1944, the Trustee's Plan, as amended by petitioner Dolan's proposals, was approved by the United States District Court for the Northern District of New York (R. pp. 80-82). A hearing was held before the District Court on April 10, 1944, to consider the confirmation of the Plan, and on May 10, 1944, the District Court made and entered an order confirming the Plan (R. pp. 103-113).

Two appeals were taken by Robert R. Meyer and Mokava Corporation, the respondents here, from two separate orders of the United States District Court for the Northern District of New York. One appeal was taken from an order of May 10, 1944, which imposed certain conditions in connection with the approval of an assignment of a mortgage to Robert R. Meyer, hereinafter described (R. pp. 62-66); the other appeal was from the order of confirmation of the Plan, also dated May 10, 1944 (R. pp. 103-113). The two appeals were heard together by the United States Circuit Court of Appeals for the Second Circuit. That Court reversed the orders of the District Court and remanded the case to the District Court.

This is a petition for a writ of certiorari to review the said decree of the United States Circuit Court of Appeals for the Second Circuit.

The Capital Structure of the Debtor

The Debtor had outstanding, in addition to its capital stock, all of one class, the following securities:

Two First Mortgages, each covering a separate part of the Debtor's property, which were placed in the same class by order of the District Court (R. p. 76). This classification the Circuit Court of Appeals held was erroneous. The mortgages were:

(a) A First Mortgage in the principal amount remaining unpaid of $364,000 and accrued interest, made by the Debtor to Onondaga County Savings Bank, dated October 1, 1908 (R. pp. 209-211), covering a part only of the Debtor's property, *viz.*, the land and building known as the Main Building. This mortgage, on or about August 28, 1943, was assigned to petitioner Dolan (R. p. 177) who

paid therefor a consideration of $291,000 (R. p. 175). It is now held by petitioners Dolan and Sovik (R. p. 175) and is hereinafter referred to as the "Dolan Mortgage".

(b) A First Mortgage in the principal amount remaining unpaid of $190,000 and accrued interest, made by the Debtor to First Trust & Deposit Company, dated December 21, 1928 (R. pp. 30-35), covering a part only of the Debtor's property, *viz.*, the land and building known as the Annex which adjoins and connects with the Main Building. This mortgage (hereinafter referred to as the "Annex Mortgage" or the "Meyer Mortgage") was purchased by respondent Meyer on April 1, 1944, on which date he paid to First Trust & Deposit Company the full principal amount and interest accrued to that date aggregating $268,850 (R. pp. 28-30). First Trust & Deposit Company executed and delivered to respondent Meyer an assignment of said mortgage, absolute in form but subject to a condition that if the District Court should determine the giving of the assignment to be improper or unlawful, respondent Meyer might be required, upon the return of his payment, to reassign said mortgage to First Trust & Deposit Company (R. p. 29). Prior to April 1, 1944, First Trust & Deposit Company had issued Participation Certificates in this mortgage in the form set forth in the Record (R. pp. 40-42) which provided that said First Trust & Deposit Company might take up and cancel such Certificates at any time on payment of the amount of principal and interest due thereon (R. p. 41). Some of the Participation Certificates did not contain this clause but merely assigned an interest in the bond and mortgage (R. pp. 42, 43) but all of the latter form of Certificates were held by First Trust & Deposit Company itself in other fiduciary capacities (R. p. 37).

(c) A Second Mortgage made by the Debtor to Syracuse Trust Company as Trustee, dated October 1, 1908 (R. p. 73), securing an issue of bonds (hereinafter referred to as the "Consolidated Bonds") outstanding in the aggregate principal amount of $233,000 (R. p. 87). This Second Mortgage covers only the Main Building, the same property covered by the Dolan Mortgage (R. p. 87). Respondent Meyer, either personally or through his wholly owned corporation (respondent Mokava Corporation) (R. p. 179), holds $53,000 of these Consolidated Bonds (R. p. 179) and has contracted to acquire more (R. p. 155).

(d) A contingent, unsecured claim in the form of notes guaranteed or endorsed by the Debtor for $4,603.85, held by petitioner Merchandise Brokerage Corporation for merchandise sold to Onondaga Company, the Debtor's subsidiary (R. p. 190).

The District Court, having found after a hearing that the Debtor was insolvent, on March 18, 1944, made and entered an order approving a Plan of Reorganization submitted by the Trustee, as amended by the proposals of petitioner Dolan (R. pp. 80-82), which provided :

(1) That the face amount of the First Mortgage on the Annex (the Meyer Mortgage) should be paid cash for the amount of the principal and one-half of the accrued interest, receiving preferred stock of the new, reorganized corporation for the other half of such interest;

(2) That the First Mortgage on the Main Building (the Dolan Mortgage) should remain a first mortgage for the amount of its principal, and for its accrued interest should receive a controlling block of the common stock of the new corporation;

(3) That the Second Mortgage Bonds (Consolidated Bonds) should receive only fifty cents on the dollar in cash; and

(4) That the unsecured claim of Merchandise Brokerage Corporation should be paid in full in cash (R. pp. 67-72, 80-82).

The said order of March 18, 1944, also provided that the acceptances of the Plan should be filed with the Trustees (such filing to be deemed filing with the Court) and fixed April 5, 1944, as the last day on which acceptances could be filed (R. p. 81).

Circumstances of Respondent Meyer's Purchase of the Annex Mortgage

Respondent Meyer, who held a controlling interest in the stock of the Debtor (R. p. 178), caused to be served on First Trust & Deposit Company (hereinafter called the "Trust Company") on April 1, 1944, a demand in accordance with Section 275 of the New York Real Property Law, requiring an assignment of said mortgage to him upon payment to the Trust Company of the full principal amount and accrued interest (R. p. 43). In view of the execution and delivery of the assignment to respondent Meyer, it is unnecessary to consider the validity of this demand and the Circuit Court of Appeals correctly so held (R. p. 228).

On April 1, 1944, respondent Meyer tendered the Trust Company the sum of $268,850 in cash which was the full amount due on the principal and accrued interest of the First Mortgage on the Annex building (R. pp. 28, 29).

The Trust Company accepted the money so tendered by respondent Meyer and on April 1, 1944, executed and delivered to him an assignment of the said mortgage containing the following condition:

> "1. That the question of whether or not acceptance of such payment and the giving of this assignment is proper and legal under all the circumstances be presented for determination to the United States District Court for the Northern District of New York in the preceeding entitled 'United States District Court, Northern District of New York, In the Matter of The Onondaga Hotel Corporation, Debtor, In Proceedings for the Reorganization of a Corporation, No. 27263,' on or before May 1, 1944, and this assignment shall be void and of no effect if the Court determines the giving thereof improper or unlawful by reason of violating rights of any participation holders or otherwise, in which event said sum of $268,850 shall be repaid without interest, and said Robert R. Meyer, his heirs or assigns, shall thereupon execute and deliver a reassignment of such mortgage to the undersigned or its assigns." (R. p. 29)

Another condition not relevant here was also contained in the assignment. This assignment was an absolute transfer of this mortgage to respondent Meyer, subject to the reserved right to a reassignment if it were disapproved by the District Court (R. pp. 28, 29). Promptly upon his purchase, on April 1, 1944, respondent Meyer delivered to the Trustee a rejection of the Plan (R. p. 92).

It was unnecessary for respondent Meyer to deal with the holders of the various Participation Certificates since such Certificates were callable at any time by the Trust

Company (R. p. 41). In fact the Trust Company was charged with the duty, on receipt of the interest and principal of the mortgage, to "distribute the same among the persons entitled thereto" (R. p. 41). This last provision necessarily implies that an interval might be expected to elapse between the time of the receipt of funds by the Trust Company and ultimate payment by it to a participant, especially as the mortgage was overdue when purchased by respondent Meyer.

On April 6, 1944, the Trust Company filed a petition in the District Court which referred to the demand, tender and assignment of the Annex Mortgage to respondent Meyer (R. pp. 37-43) and asked the Court to make "a determination of the matters and questions which such conditions provide shall be presented to and determined by" the Court (R. p. 40).

This petition came on for hearing on April 10, 1944 (R. pp. 40-114). At this hearing the District Court announced that "I shall not refuse the First Trust Company the right to assign their mortgage" (R. p. 129). The whole procedure was obviously unnecessary. No court approval is necessary to permit anyone holding securities of a corporation involved in reorganization to transfer them.

In spite of the statement just referred to, the District Court deferred signing any order until May 10, 1944 (R. pp. 62-66), the same day on which the order of confirmation was signed (R. pp. 103-113).

The District Court in this order of May 10, 1944, held that it would not permit respondent Meyer to vote on the Plan as the holder of the Annex Mortgage. Said order contained the following provisions:

"THIRD: That this Court, subject to the provisions in Paragraph 'FIFTH' hereof, makes no disapproval of the assignment of said mortgage as a voluntary act and, subject to the provisions in Paragraph 'FIFTH' hereof, consents thereto.

FOURTH: That the acceptance of all participation certificate holders—which have been filed prior to this hearing—be deemed to have been filed as of April 5, 1944.

FIFTH: That the approval given by this Court to said assignment as hereinbefore set forth does not and shall not deprive owners of participation certificates, who had not on April 10, 1944 been paid nor had payment tendered to them for their certificates with interest, of their right to vote upon or participate in the plan presented by T. Frank Dolan, Jr. under date of February 24, 1944, which plan is now before this Court for confirmation." (R. p. 66)

Thus, the District Court did not determine that the assignment of the mortgage dated April 1, 1944, from the Trust Company to respondent Meyer was improper or unlawful. On the contrary, the District Court consented thereto but attached a condition that the assignment should not deprive the owners of the Participation Certificates of their right to vote on the Plan.

The end result of all this was that respondent Meyer did not get his money back to which he was clearly entitled under the terms of the assignment in the event that the District Court should not approve the same (R. p. 29) and the District Court refused him the right to vote as the owner of the mortgage. Instead, the holders of the Participation Certificates in the mortgage paid off in full, principal and interest, were allowed to retain the right to

vote on a Plan of Reorganization of a Debtor in which they no longer had any interest whatsoever.

The Circuit Court of Appeals correctly held this to be error, stating:

> "Accordingly, the district court erred in its order allowing the acceptances of the certificate holders to be counted and in refusing to consider Meyer's vote against the plan." (R. p. 229)

ARGUMENT

POINT I

The Decision Below was Correct; the District Court's Denial of Meyer's Right to Vote on the Plan as the Owner of the Annex Mortgage was Obviously Error.

The petitioners' brief asserts that if Meyer did not effectively acquire the First Trust Mortgage through the assignment, then the whole basis of the Circuit Court's decision fails (Petition, p. 27). Assuming for the purposes of argument that this statement is correct, nevertheless, the difficulty with petitioners' position is precisely that Meyer did effectively acquire the mortgage on the Annex from the Trust Company.

There can be no question about the facts. On April 1, 1944, the attorney for Meyer delivered to the Trust Company a certified check in the amount of $268,850 in full payment of the principal due and interest accrued to that date on the mortgage on the Annex Building (R. p. 118). With that payment there was served upon the Trust Company a demand signed by the Debtor, by one of its officers, for an assignment of this mortgage to Meyer (R. p. 118).

The Trust Company executed and delivered an assignment to respondent Meyer dated April 1, 1944, (R. pp. 28, 29) which provides in part as follows:

> "* * * First Trust & Deposit Company, in consideration of $268,850 paid to it as above stated, hereby assigns, without recourse, to Robert R. Meyer the mortgage dated December 21, 1928, given by the Onondaga Hotel Corporation * * *." (R. p. 28)

Then follows the condition referred to and quoted above in this brief (p. 7).

With respect to this transaction, the Circuit Court of Appeals said:

> "Meyer effectively acquired that mortgage through his purchase and the assignment thereof on April 1, 1944. * * * For, as the Court below said, the First Trust made a valid voluntary assignment * * *." (R. p. 228)

We fail to see how anyone can successfully dispute that statement. But the petitioners say the District Court did not hold that it was a "voluntary" assignment (Petition, p. 29). This statement is completely refuted by the record of the proceedings in the District Court. The District Court said at the hearing on April 10, 1944:

> "* * * I consider the demand just a nullity. That does not prevent the First Trust and Deposit or any party interested from selling their interest, but it must be considered as a voluntary sale rather than a sale based upon any demand and it must not be considered something that they had to do in order to comply with the demand." (R. p. 116)

And again the District Court said:

> "I shall not refuse the First Trust Company the right to assign their mortgage. * * * The First Trust can assign if they want to, but I shall rule that all holders of certificates in that mortgage today have the right to vote on the approval or disapproval of the plan." (R. pp. 129, 130)

Furthermore, in the order of the District Court dated May 10, 1944, the following paragraph appears:

> "SECOND: That the First Trust & Deposit Company was not obligated to comply therewith and that the assignment of the mortgage given by the abovenamed debtor, The Onondaga Hotel Corporation, dated December 21, 1928, and recorded in the Onondaga County Clerk's Office December 27, 1928, must be considered a voluntary sale and not one in compliance with the aforesaid demand." (R. p. 65)

Clearly, the District Court did hold that it was a voluntary assignment.

Moreover, that Court made no disapproval of the assignment. The same order of the District Court continued:

> "THIRD: That this Court, subject to the provisions in Paragraph 'FIFTH' hereof, makes no disapproval of the assignment of said mortgage as a voluntary act and, subject to the provisions in Paragraph 'FIFTH' hereof, consents thereto." (R. p. 66)

But the District Court, while making no disapproval of the assignment of the mortgage as a voluntary act, nevertheless, effectively prevented respondent Meyer from voting on the Plan as the owner of that mortgage, by providing that the owners of the Participation Certificates had the right to vote upon the Plan (R. p. 66).

Section 203 of the Bankruptcy Act (52 Stat. 894 (1938), 11 U. S. C. § 603 (1940)) provides the method by which, in certain cases, a claim may be disqualified from voting. Such disqualification may be made in a proper case only "after hearing upon notice". The District Court did not follow any such procedure here. Even if it had, the circumstances in this case would not have justified disqualification.

In re Pine Hill Collieries Co., et al., 46 F. Supp. 669 (E. D. Pa., 1942);

Texas Hotel Securities Corporation v. *Waco Development Co.*, 87 F. (2d) 395 (C. C. A. 5th, 1936), *cert. denied* 300 U. S. 679;

In re Pressed Steel Car Co., 16 F. Supp. 325, 337 (W. D. Pa., 1936).

There is no conflict among the Circuits on this point. The case of *Herbert V. Apartments Corp.* v. *Mortgage Guarantee Co.*, 98 F. (2d) 662 (C. C. A. 3d, 1938), *cert. denied* 305 U. S. 640, seems to be cited by the petitioners as in conflict with the decision of the Court below to the effect that Meyer's purchase of the Annex Mortgage and the assignment of it to him divested the Participation Certificate holders, including Dolan, of any interest in the mortgage (Petition, pp. 16, 17). There is not the slightest conflict between the *Herbert* case and the decision of the Court below. In the *Herbert* case there was never any question of a sale or assignment. The main question was whether or not holders of Participation Certificates who had given the mortgage company power of attorney to represent them in a proceeding under Section 77B were "creditors" entitled to notice under the Bankruptcy Act.

The Court held that even though these certificate holders had given power of attorney to the mortgage company, they were entitled to notice. We fail to see any similarity whatever between that situation and the facts of the instant case.

Nor do the opinions in *In re Castle Beach Apartments, Inc.*, 113 F. (2d) 762 (C. C. A. 2d, 1940), or in *In re Blinrig Realty Corporation*, 114 F. (2d) 100 (C. C. A. 2d, 1940), cited by the petitioners (Petition, pp. 25, 26), disclose any conflict with the decision of the Court below in the case at bar. In the cases cited, one of the questions was whether the trustee for the benefit of the holders of participation certificates had the power to vote in the place of such holders. Obviously there is no such question here.

It is clear that respondent Meyer, as the sole owner of the Annex Mortgage by assignment from the Trust Company, should have been permitted to vote on the Plan of Reorganization rather than the holders of the Participation Certificates, and that the failure of the District Court to permit him to do so was error, as the Court below has held.

POINT II

The Court Below Correctly Held that it was Error for the District Court to Lump Together Two First Mortgages on Different Properties of the Debtor and then to Give Substantially Different Treatment to those Mortgages in the Plan.

It has been repeatedly held that where there are two first mortgages covering different properties, it is necessary to examine the underlying security and to determine with respect to the ratio of debt to security value and other fac-

tors, whether or not the two groups of security holders should be treated equally.

Group of Investors v. *Milwaukee R. R. Co.*, 318 U. S. 523 (1943);
Ecker v. *Western Pacific R. Corp.*, 318 U. S. 448, 482 (1943);
Consolidated Rock Products Co. v. *Du Bois*, 312 U. S. 510 (1940);
Gerdes on Corporate Reorganizations, Section 1045.

The petitioners point out that no appeal was taken from the order of the classification (Petition, p. 10). However, the petitioners ignore the fact that at the time the classification order was entered, the present Plan of Reorganization, as amended, and as confirmed, was not before the court. The Court below has correctly stated in its opinion that:

> "* * * We need not, therefore, consider whether a failure to appeal from a classification order, entered when a plan is before the Court precludes a later appeal from the order approving a plan, challenging the fairness of that plan, which raises the validity of the classification order. * * *" (R. p. 228)

The petitioners contend that the Trustee's Plan dated April 7, 1943, was before the court (Petition, pp. 16, 19), but it was the Trustee's Plan *as amended* by the proposals of petitioner Dolan, dated February 24, 1944, which was approved by the order of the District Court of March 18, 1944 (R. pp. 80-82). Obviously, this amended Plan could not have been before the court when the classification order was entered on April 30, 1943.

There is, therefore, no conflict between the decision of the Court below and the decision of the Seventh Circuit in the case of *In re Irving-Austin Building Corporation*, 96 F. (2d) 905 (C. C. A. 7th, 1938), which is relied upon by the petitioners (Petition, pp. 10, 11). It clearly appears from the record on appeal in that case that there was no amendment of the plan after the order of classification. The plan in its final form as amended was before the court when the order of classification was entered.

The Court below did not hold that the order of classification must be made when a plan of reorganization is before the court (Petition, p. 8), and there is no conflict with the decision of the Fifth Circuit in *Texas Hotel Securities Corporation* v. *Waco Development Co.*, 87 F. (2d) 395 (C. C. A. 5th, 1936).

The appeal to the Court below brought up for review the order of the District Court confirming the Plan (R. p. 10). The fact that no appeal was taken from the order of the District Court approving the Plan is unimportant since Section 180 of the Bankruptcy Act (52 Stat. 892 (1938), 11 USC § 580 (1940)) provides that the order approving the Plan shall not affect the right of a creditor to object to the confirmation of the Plan.

The petitioners also contend that the decision of the Court below is in conflict with the decision of the Seventh Circuit in the case of *In re Palisades-on-the-Desplaines*, 89 F. (2d) 214 (C. C. A. 7th, 1937). There, separate first mortgages on 22 different parcels of real estate were placed in the same class. In that case, however, the Circuit Court of Appeals for the Seventh Circuit recognized the general rule in reorganization proceedings that all creditors of equal rank with claims against the same property should be placed

in the same class, and that creditors with claims against different properties should be placed in different classes. But the court held that in the peculiar circumstances of that case, the District Court was justified in making an exception to the general rule. In that case, the facts were that the secured creditor objecting to the plan admitted that the real property upon which he held a mortgage was worth only one-fourth of his claim, and the court held that he could not complain of a plan which, if successful, would result in his receiving 70% of his claim, and, if unsuccessful would result in his receiving the security without foreclosure. Obviously, in these circumstances, the creditor was not harmed by the classification. But the court's reasoning supports the general rule and notes that that case constituted an exception. There is nothing in the facts of the case at bar which affords any excuse whatever for a departure from the general rule.

Moreover, in the case at bar, the error in classification was aggravated when the District Court approved and confirmed a Plan which afforded substantially different treatment to the holders of the two first mortgages. The principal of the Dolan Mortgage is to remain outstanding and the accrued interest thereon to be discharged by the issuance of a controlling block of the common stock of the new corporation (R. pp. 67-69). Contrast this with the treatment given to the Meyer Mortgage which is to receive payment in cash for the principal and one-half of the accrued interest, and to receive preferred stock of the new corporation for the other half of such interest (R. p. 67). There is accrued unpaid interest on the Meyer Mortgage in the amount of $78,850 as of April 1, 1944 (R. p. 28), so that the result of this provision is that respondent Meyer

was forced to accept more than $39,000 in preferred stock of the new corporation in discharge of half of the accrued and unpaid interest due on his mortgage. Accrued and unpaid interest is entitled to protection as well as principal. *In re Janson Steel & Iron Co.*, 47 F. Supp. 652 (E. D. Pa., 1942).

The petitioners assert that this preferred stock continued to remain a first lien on the Annex and also became a lien on all the rest of the Debtor's assets (Petition, p. 18). This statement is completely unsupported by any reference to the record, and we fail to find any provision in the Plan whereby the preferred stock of the new corporation becomes a lien on the Annex or the rest of the Debtor's assets.

The Circuit Court of Appeals was correct when it held that "the error here was aggravated when the Court approved a plan according very substantially different treatment to the two mortgages." (R. p. 228)

POINT III

The Court Below Correctly Held that the District Court Erred in its Treatment of the Holders of Consolidated Bonds.

The District Court confirmed the Plan without acceptance by the requisite amount of the Second Mortgage or "Consolidated Bonds" and disposed of them entirely both as to principal and interest by payment of 50% of their principal amount (R. p. 70). There was no hearing held after notice to the holders of the Consolidated Bonds, at which evidence was taken to support that finding. Indeed,

the District Court denied counsel for holders of these Bonds the right to file objections to the Plan (R. p. 157).

It is obviously no answer to say that the District Court's valuation of the Consolidated Bonds was based upon the evidence in the solvency trial, as there the issue was entirely different, nor is it any answer to suggest that respondent Meyer is in some way estopped from asking for more than 50% of the Consolidated Bonds which he holds. Many persons other than Meyer are holders of these Consolidated Bonds (R. pp. 153, 190). Moreover, respondent Meyer, at the hearing before the District Court on May 10, 1944, took a proper exception to the Court's ruling fixing the value of the Consolidated Bonds at 50% (R. pp. 169, 170). Obviously, therefore, there is no conflict between the decision of the Court below and the decision of the Seventh Circuit in the case of *In re Waern Building Corporation*, 145 F. (2d) 584 (C. C. A. 7th, 1944) where the objection was raised for the first time on appeal.

Similarly, there is no conflict between the decision of the Court below and that of the Ninth Circuit in the case of *Mason* v. *Eldorado Irrigation District*, 144 F. (2d) 189 (C. C. A. 9th, 1944) where there was no claim of any harm suffered by the objecting creditor because of omission of notice of hearing on the final decree, or the holding of the Fourth Circuit in *Pullman Couch Co.* v. *Eshelman, et al.*, 1 F. (2d) 885 (C. C. A. 4th, 1924) where there was a substantial compliance with the statute by notice given at a legal meeting of creditors.

POINT IV

The Court Below Correctly Held that the District Court Erred in Confirming a Plan which Provided for Full Payment in Cash to an Unsecured Creditor and not to the Holders of the Second Mortgage Bonds.

The Plan confirmed by the District Court provides that the claim of petitioner Merchandise Brokerage Corporation shall be paid in full without interest (R. p. 71), while holders of the Second Mortgage or Consolidated Bonds were to be paid 50% of the principal amount in full payment of principal and interest (R. p. 70).

The petitioners now assert that no issue was raised by respondent Meyer with respect to this provision for full payment in cash of petitioner Merchandise Brokerage Corporation (Petition, p. 24). This is not correct. Respondent Meyer's objections to the confirmation of the Plan dated April 7, 1944, specifies as one of the grounds of his objections that the Plan provides for payment in full of contingent creditors set forth in Class 9 (Merchandise Brokerage Corporation) and fails to provide the same treatment for the creditors in Class 8 (Consolidated Bondholders), and that such treatment is unfair, unjust and inequitable (R. p. 94). Thus, this point was not raised for the first time on appeal and there is no conflict between the decision of the Court below and the decision of the Seventh Circuit in *In re Waern Building Corporation,* 145 F. (2d) 584 (C. C. A. 7th, 1944) or with the decision of the Seventh Circuit in *Maloney* v. *Brandt,* 123 F. (2d) 779 (C. C. A. 7th, 1941).

Obviously respondent Meyer's objection to the treatment of the claim of petitioner Merchandise Brokerage Corporation should have been sustained by the District Court, and the Circuit Court of Appeals correctly so held (R. pp. 229, 230). *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106 (1939).

POINT V

There is no Conflict with Decisions of Other Circuit Courts and the Case is of no General Importance.

As we have shown in our discussion under the preceding points, there is no conflict between the decision of the Court below and other Circuit Courts.

The case depends upon its own special facts, and the decision below does not lay down any novel principle of Federal Bankruptcy Law.

The petitioners assert that what the Court below has done is to grant to Meyer the right to vote claims in bankruptcy owned by Dolan (Petition, p. 34). This statement is clearly incorrect. Instead, what the Court below has done is to recognize Meyer's right to vote claims in bankruptcy which he owns (the Annex Mortgage), and for which he paid in full, principal and interest (R. p. 118), and to deny to the holders of Participation Certificates who were paid off in full the right to retain their votes on a Plan for the reorganization of a Debtor in which they no longer had any interest.

Conclusion

The case was correctly decided below; there is no conflict of decisions, and the decision below is of no general

importance as it depends upon the special facts of this case. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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